

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-214517.2

DATE: August 13, 1984

MATTER OF: Aul Instruments, Inc.

DIGEST:

1. Agency's decision not to waive first article testing for protester who has other government contracts for item to be procured, but has not gained approval for production, and to grant waiver for firm whose item is on QPL is not arbitrary or capricious and, therefore, will not be disturbed by GAO.
2. Award of contract to bidder that is low with waiver of first article testing is proper when contract with first awardee is terminated due to error in bid evaluation.
3. Agency's decision not to waive first article testing for protester is not a matter that must be referred to Small Business Administration since it does not constitute a finding of nonresponsibility.

Aul Instruments, Inc. (Aul), protests the termination for convenience of its contract No. DLA400-84-C-0893 by the government and the subsequent award of contract No. DLA400-84-C-1257 to Ward-Leonard Electric Co., Inc. (Ward-Leonard). For the reasons set forth below, this protest is denied.

Under an invitation for bids (IFB) dated September 15, 1983, the Defense General Supply Center (DGSC), Richmond, Virginia, solicited bids to supply type I battery chargers. The IFB required first article testing and approval for the battery chargers, but allowed the government to waive this requirement if identical or similar supplies "have been previously furnished by the offeror and have been accepted by the government." If waiver of first article testing was denied, clause M-15 of the IFB required \$23,000 to be added to the bid to pay for this testing.

When bids were opened December 28, 1983, Aul's bid was \$37,880 and Ward-Leonard's was \$55,230. Both bids were evaluated without addition of the \$23,000 for first article testing. Aul received the contract on February 3, 1984, but Ward-Leonard protested to the agency whether Aul's battery chargers had been accepted by the government, arguing that, if they had not, \$23,000 should have been added to Aul's bid.

The contracting officer reexamined the files and discovered that an error had been made in the initial evaluation of the bids. Although Aul had received other government contracts to supply battery chargers, the chargers had not yet passed first article testing under these contracts. Therefore, the chargers lacked the necessary government approval to allow Aul a waiver of the \$23,000 testing costs. With this amount added to its bid, Aul's price became \$60,880, making Ward-Leonard the low bidder at \$55,230.

Finding that it was in the government's best interest, the contract with Aul was terminated on February 21, 1984. Three days later the contract was awarded to Ward-Leonard after the contracting officer determined that Ward-Leonard was eligible for waiver of first article testing because its battery chargers were listed on a qualified products list (QPL).

In its protest, Aul contends it should have had first article testing waived and been allowed to keep the contract because Aul currently has two contracts with the government to supply type I battery chargers and will soon be submitting a first article for testing under these contracts. Furthermore, Aul contends that Ward-Leonard should not be allowed a waiver of first article testing because it has not performed a contract with the government to supply battery chargers. According to Aul, having products on a QPL should not entitle a company to a waiver of first article testing under the present contract.

To qualify for waiver under the present contract, an offeror must have previously furnished its battery chargers to the government and they must have been accepted. The fact that Aul has received other government contracts does not indicate that it has furnished, or that the government has accepted, its battery chargers.

We do not agree with Aul's argument that notice to the contracting officer that a first article had been submitted for testing was sufficient basis for waiving the testing requirement for Aul. Baird Corporation, B-213233, Dec. 20, 1983, 84-1 C.P.D. ¶ 8, which Aul cites to support its position that first article testing waiver can be granted even though testing is not complete, first article testing for the company receiving waiver was substantially complete. Technical experts advised the contracting officer that there was a low risk of failure on the two remaining tests and that the item had passed all the other tests. Moreover, the company had previously supplied a very similar product under a contract administered by the same contracting officer. This is distinguishable from the instant case where first article testing for Aul's battery charger had not begun when DGSC terminated Aul's contract. Technical experts advised the contracting officer not to waive government testing for Aul.

In response to the agency report, Aul argues that, as a question of responsibility, the decision of waiver of first article testing should have been submitted to the Small Business Administration (SBA). However, the contracting officer is only required to refer such matters to the SBA after determining the offeror is nonresponsible. In this instance, the award to Aul was terminated, not because Aul was nonresponsible, but because the addition of testing costs to Aul's bid made it higher than Ward-Leonard's.

The purpose of referring the question of a small business firm's responsibility to the SBA is to determine the firm's ability to perform if awarded the contract. Amplitronics, Inc., B-209339, Mar. 1, 1983, 83-1 C.P.D. ¶ 210. Here, DGSC's denial of first article waiver for Aul was not a determination that Aul was not capable of performing the contract, but that testing was necessary to insure that Aul's battery charger meets government standards. We have previously held that such decisions need not be referred to the SBA. Id.

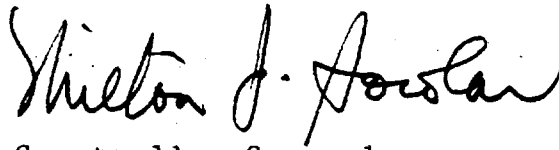
We disagree with Aul's assertion that it was not in the government's best interest to terminate its contract. When an error is made in the evaluation of bids, it is appropriate to terminate the improperly awarded contract and award it to the bidder who should have received it initially. Velda Farms, Division of The Southland Corporation, B-192307, Oct. 3, 1978, 78-2 C.P.D. ¶ 254.

As for Aul's complaint that termination costs for its contract increase the price of reawarding the contract to Ward-Leonard, nothing suggests that the termination costs are so great that we should interfere with the contracting officer's decision that a reaward of the contract serves the government's best interest. Preserving the integrity of the competitive system outweighs the cost and possible administrative inconvenience of terminating Aul's contract. Central Texas College, B-211167.3, Mar. 2, 1984, 84-1 C.P.D. ¶ 259.

Ward-Leonard, on the other hand, had furnished a battery charger to the government which was accepted prior to bid opening. This is evident by the company's QPL listing of its type I battery charger. To qualify for such QPL listing, a company must submit its product for government testing. If it complies with government specifications, the product and company will be identified on a QPL. T.G.L. Rubber Company, Ltd., B-206923, Sept. 20, 1982, 82-2 C.P.D. ¶ 239. Therefore, any product on a QPL has been furnished to and accepted by the government. We find no reason to question the government's decision that Ward-Leonard's QPL listing was sufficient to qualify the company for waiver of testing costs under the present contract. The decision to waive first article testing is an administrative one which our Office will not disturb unless clearly arbitrary or capricious. Baird Corporation, B-213233, supra.

We find no merit in Aul's complaint that DGSC cannot award Ward-Leonard the contract because the acceptance time for bids has passed or because the initial award to Aul amounted to rejection of all other bids. The record reveals that Ward-Leonard extended its bid through March 26, 1984, and was awarded the contract on February 24, 1984, well before its bid expired.

The protest is denied.

for 
Comptroller General
of the United States